

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

GILDARDO CAZARAS, aka Gildardo
Cazarez-Chavez,

Defendant.

No. 4:15-CR-6024-EFS

**ORDER GRANTING DEFENDANT'S MOTION
TO DISMISS**

A hearing occurred in the above-captioned matter on October 6, 2015. Defendant Gildardo Cazaras was represented by Rebecca Pennell and assisted by a Spanish-speaking interpreter. Mary Dimke appeared on the behalf of the United States of America. The Court reviewed Mr. Cazaras' Motion to Dismiss, ECF No. 26, related briefing, and case law, and considered oral argument. Mr. Cazaras asks the Court to dismiss the Indictment because it is predicated on an invalid order of removal as it was based on Mr. Cazaras' misdemeanor theft conviction—a conviction that is not an aggravated felony or a crime of moral turpitude. The United States opposes the motion, contending that the theft statute is divisible between theft of services and theft of property, and Mr. Cazaras' theft-of-property conviction constituted an

1 aggravated felony. This Order supplements and memorializes the Court's
2 ruling granting Defendant's motion.

3 **A. Background**

4 Mr. Cazaras is a citizen of Mexico, who immigrated to the United
5 States with his parents when he was a child. In 1995, he received
6 lawful permanent residence status in the United States. ECF No. 26,
7 Ex. A at 14. A year later, at the age of 19, Mr. Cazaras was cited for
8 violating Kennewick Municipal Code § 10.10.020, which is consistent
9 with RCW 9A.45.020, by committing the misdemeanor offense of theft
10 third/shop-lifting. ECF No. 26, Ex. B at 39. Mr. Cazaras pled guilty
11 and was sentenced to 365 days in jail with 350 days suspended. He was
12 allowed work crew after two days in jail. *Id.*, Ex. C at 40.

13 Mr. Cazaras remained in the United States for several years and
14 retained his lawful permanent resident status. In 2003, Mr. Cazaras
15 was convicted of felony hindering prosecution in violation of Oregon
16 Revised Statute 162324. ECF No. 26, Ex. D at 41-43. He received a
17 sentence of three-years probation. *Id.*

18 Following the 2003 conviction, Mr. Cazaras received a Notice to
19 Appear, alleging that he was deportable from the United States as an
20 aggravated felon due to his theft conviction. *Id.*, Ex. E at 23-24.
21 During the immigration proceeding, Mr. Cazaras was represented by
22 Kaaren Barr¹ and then Aimee Souza. *Id.*, Ex. F-M. The immigration judge
23 permitted the government to add charges against Mr. Cazaras, alleging
24

25 ¹ In 2012, Ms. Barr was disbarred by the Washington State Bar Association
26 given her inadequate representation of clients in her immigration practice.
See Washington State Bar Ass'n, *Discipline Notice - Kaaren L. Barr*, March 9,
2012, available at
<https://www.mywsba.org/DisciplineNotice/DisciplineDetail.aspx?dID=1641>.

1 that Mr. Cazaras was also removable on the basis of having convictions
2 for two crimes of moral turpitude—his misdemeanor theft conviction and
3 felony hindering prosecution conviction. The immigration judge
4 determined that Mr. Cazaras' theft offense was an aggravated felony,
5 and continued the hearing to determine whether hindering prosecution
6 was a crime of moral turpitude or whether Mr. Cazaras was eligible for
7 relief from deportation. After receiving briefing from the parties,
8 the immigration judge determined that both of Mr. Cazaras' prior
9 convictions were crimes of moral turpitude and that Mr. Cazaras was
10 not eligible for relief from deportation because he had been convicted
11 of an aggravated felony. The immigration judge issued a written order
12 of removal in 2005. *Id.* at 77.

13 Mr. Cazaras appealed the case to the Board of Immigration
14 Appeals (BIA). *Id.* at 81-82. The BIA dismissed the appeal on the
15 merits, finding that Mr. Cazaras had been convicted of two crimes of
16 moral turpitude and that he was not eligible for relief from
17 deportation because he had been convicted of an aggravated felony. *Id.*

18 Mr. Cazaras deported himself to Mexico, pursuant to the terms of
19 his bail order. Then in March 2012, Mr. Cazaras was twice found in the
20 United States. On both of these occasions, the U.S. Department of
21 Homeland Security issued notices to Mr. Cazaras, reinstating his April
22 27, 2005 order of removal. A warrant of removal was executed on both
23 March 7, 2012, and March 21, 2012. *Id.*, Exs. S & U.

24 On August 11, 2015, the instant Indictment, charging Mr. Cazaras
25 with illegally reentering the United States subsequent to his prior
26 deportation on March 21, 2012, was filed. ECF No. 14.

1 **B. Authority and Analysis**

2 The Fifth Amendment's due process clause affords a criminal
3 defendant charged with violating 8 U.S.C. § 1326 with an opportunity
4 to seek judicial review of an underlying deportation. *United States v.*
5 *Zarate-Martinez*, 133 F.3d 1994, 1197 (9th Cir. 1998), *overruled on*
6 *other grounds by United States v. Corona-Sanchez*, 291 F.3d 1201 (9th
7 Cir. 2002). To collaterally attack the deportation order underlying a
8 § 1326 criminal proceeding, the defendant must show:

- 9 (1) the alien exhausted any administrative remedies that
10 may have been available to seek relief against the order;
11 (2) the deportation proceedings at which the order was
12 issued improperly deprived the alien of the opportunity for
13 judicial review; and
14 (3) the entry of the order was fundamentally unfair.

15 8 U.S.C. § 1326(d). The first two requirements—exhaustion and improper
16 denial of judicial review—are satisfied if the defendant establishes
17 that the immigration judge improperly failed to inform him of his
18 eligibility for relief. *United States v. Arias-Ordonez*, 597 F.3d 972,
19 977 (9th Cir. 2010). The third requirement—entry of the order was
20 fundamentally unfair—can be met by showing that 1) the defendant's
21 due-process rights were violated during the underlying deportation
22 proceeding and 2) he suffered prejudice as a result. *See, e.g., United*
23 *States v. Ramon*, 623 F.3d 672, 680 (9th Cir. 2010); *United States v.*
24 *Leon-Leon*, 35 F.3d 1428, 1431 (9th Cir. 1994).

25 Mr. Cazaras argues that his due-process rights were violated
26 because he did not have two crimes of moral turpitude and his theft
conviction is not an aggravated felony and therefore he was prejudiced

1 by the immigration judge failing to advise him that he was eligible
2 for relief from deportation.

3 First, as to whether Mr. Cazaras' due-process rights were
4 violated, the parties agree that Mr. Cazaras' prior conviction for
5 theft does not qualify as a crime of moral turpitude in light of
6 *Washington v. Komok*, 113 Wn.2d 810 (1989), and *Castillo-Cruz v.*
7 *Holder*, 581 F.3d 1154, 1159 (9th Cir. 2009). Because an individual is
8 deportable if he has two or more prior convictions for moral-turpitude
9 crimes, and Mr. Cazaras only has one prior moral-turpitude crime, he
10 was not deportable under this standard.

11 Therefore, the central issue is whether Mr. Cazaras' 1996 state-
12 court misdemeanor theft conviction was an aggravated felony for which
13 he was subject to deportation. If Mr. Cazaras' theft conviction was an
14 aggravated felony, then he was not eligible for relief from removal,
15 and the immigration judge's failure to inform him about the
16 availability of such relief cannot have prejudiced him.

17 To determine whether a state conviction qualifies as an
18 aggravated felony under the Immigration and Nationality Act (INA), the
19 court employs a categorical approach to evaluate whether the state
20 statute defining the crime of conviction categorically fits within the
21 INA's definition of "aggravated felony." *Descamps v. United States*,
22 133 S. Ct. 2276, 2283 (2013); *Moncrieffe v. Holder*, 133 S. Ct. 1678,
23 1684 (2013). Under the categorical approach, the court must consider
24 only what conduct the state statute necessarily involved, not the
25 specific facts underlying the conviction. *Moncrieffe*, 133 S. Ct. at
26 1684. The court presumes that the conviction rested on the "least of

1 the acts criminalized," as long as there is a "realistic probability,
2 not a theoretical possibility, that the State would apply its statute
3 to conduct that falls outside" the definition of "aggravated felony."
4 *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007). If the court
5 finds that the statute of conviction is not categorically an
6 aggravated felony, i.e., that there is some conduct proscribed by the
7 state statute that would not be punished as an INA aggravated felony—
8 then the court must determine whether the modified categorical
9 approach may be used to facilitate the categorical analysis. *Descamps*,
10 133 S. Ct. at 2283. The modified categorical approach is appropriate
11 if the state statute of conviction lists multiple alternative versions
12 of the crime, such that the court cannot determine for which crime the
13 defendant was convicted. *Id.* Such a statute is considered "divisible."
14 *Id.* When faced with a divisible statute, the court may look beyond the
15 statute to a narrow set of documents, such as the indictment or the
16 plea agreement, to determine which portion of the statute covered the
17 defendant's conviction. *Id.* at 2285.

18 With this analytical framework, the Court turns to the statutes
19 at issue here. To qualify as an aggravated felony under the INA, a
20 misdemeanor-theft conviction must meet the requirements of INA §
21 101(a)(43). *United States v. Gonzalez-Tamariz*, 310 F.3d 1168 (9th Cir.
22 2002); *Habibi v. Holder*, 673 F.3d 1082, 1088 (9th Cir. 2011). A "theft
23 offense" under INA § 101(a)(43)(G), which will be referred to as
24 "generic federal theft," means "a taking of property or an exercise of
25 control over property without consent with the criminal intent to
26 deprive the owner of rights and benefits of ownership, even if such

1 deprivation is less than total or permanent." *Huerta Guevara v.*
2 *Ashcroft*, 321 F.3d 883, 886 (9th Cir. 2003) (quoting *Corona-Sanchez*,
3 291 F.3d at 1205), superseded on other grounds by statute as explained
4 in *United States v. Gomez-Mendez*, 486 F.3d 599, 604-05 (9th Cir.
5 2007).

6 In comparison, Defendant's theft offense was defined as:

7 (a) To wrongfully obtain or exert unauthorized control over
8 the property or services of another or the value thereof,
9 with intent to deprive him of such property or services; or
10 (b) By color or aid of deception to obtain control over the
11 property or services of another or the value thereof, with
intent to deprive him of such property or services; or
12 (c) To appropriate lost or misdelivered property or
services of another, or the value thereof, with intent to
deprive him of such property or services.

13 Kennewick Munic. Code § 10.10.015; see also RCW 9A.45.020.

14 Washington's theft statute clearly encompasses more conduct than
15 the generic federal theft. The USAO submits the Court can utilize the
16 modified categorical approach to ascertain whether Mr. Cazaras' theft
17 conduct satisfies the generic federal theft definition because the
18 Washington theft statute is divisible as it provides for criminal
19 liability for a theft of "property or services of another or the value
20 thereof." Kennewick Munic. Code § 10.10.015 (emphasis added).
21 Defendant disagrees that the inclusion of "or" in § 10.10.105(a) makes
22 the statute divisible. The Court finds that both parties are in part
23 correct: Kennewick Municipal Code § 10.10.015 is divisible into three
24 subsections, but § 10.10.015(a) is not divisible. The parties agree
25 that the focus is on subsection (a): "To wrongfully obtain or exert
26 unauthorized control over the property or services of another or the
value thereof, with intent to deprive him of such property or

1 services." This subsection is indivisible; the use of the term "or"
2 between property and services does not cause this theft subsection to
3 be divisible.

4 This determination that § 10.10.015(a) is indivisible is
5 consistent with the Ninth Circuit's decision in *Rendon v. Holder*, 764
6 F.3d 1077 (9th Cir. 2014), and the Washington Supreme Court in
7 decision *Washington v. Linehan*, 147 Wn.2d 638 (2002). In *Rendon*, the
8 Ninth Circuit amplified on the Supreme Court's divisible-indivisible
9 distinction in *Descamps*, holding that "the presence of an 'or' between
10 'grand or petit larceny' and 'any felony' does not, in itself, render
11 the statute divisible." 764 F.3d at 1081. The critical distinction
12 between divisible statutes and indivisible statutes is "that while
13 indivisible statutes may contain multiple, alternative *means* of
14 committing the crime, only divisible statutes contain multiple,
15 alternative *elements* of functionally separate crimes." *Id.* at 1084-85
16 (emphasis in original). To aid in distinguishing between alternative
17 means of committing the crime versus alternative elements of separate
18 crimes, the court should consider whether the "state law requires that
19 in order to convict the defendant the jury must unanimously agree that
20 he committed a particular substantive offense contained within the
21 disjunctively worded statute;" if so, then the "statute contains
22 alternative *elements* and not alternative *means*." *Id.* at 1086.

23 In *Washington v. Linehan*, in the context of a defendant's
24 challenge to the jury instructions regarding the Washington theft
25 statute, RCW 9A.56.030, and the Washington statute defining theft, RCW
26 9A.56.020, the Washington Supreme Court determined that "theft" is one

1 offense, which can be committed in a variety of means, none of which
2 require jury unanimity. To prove a violation of the Washington theft
3 statute, the prosecutor does not need to prove, nor the jury
4 unanimously agree, that the defendant specifically took property,
5 services, or the value thereof. Rather, the jury simply needs to
6 unanimously agree that the defendant took property and/or services
7 and/or or the value thereof. Therefore, theft's item-taken element has
8 three different means of commission, and the jury need unanimously
9 agree as to one specific item-taken means. *See Linehan*, 147 Wn.2d at
10 649; see also Washington Pattern Jury Instruction 4.25, Jury Unanimity
11 ("When a statute sets forth a single offense that may be committed by
12 alternative means, there must be jury unanimity as to guilt for the
13 single crime charged. However, unanimity is not required as to the
14 means by which the crime was committed, provided there is substantial
15 evidence to support each of the alternative means."

16 Accordingly, based on *Linehan* and the language of Kennewick
17 Municipal Code § 10.10.015, the Court finds that § 10.10.015(a)'s
18 language is broader than the INA's generic federal theft, which only
19 applies to property, not services. Because § 10.10.015(a) encompasses
20 conduct that is not within the generic theft offense, and §
21 10.10.015(a) is indivisible, the Court determines that Cazaras' prior
22 theft conviction does not qualify as an aggravated felony. As a
23 result, Cazaras' due process rights were violated when the immigration
24 judge failed to advise him that he was eligible for relief from
25 deportation. *See United States v. Martinez*, 786 F.3d 1227, 1230 (9th
26 Cir. 2015).

1 **C. Conclusion**

2 Because Mr. Cazaras' misdemeanor theft conviction is neither a
3 crime of moral turpitude nor an aggravated felony, his due process
4 rights were violated when the immigration judge failed to advise him
5 that he was eligible for relief from deportation. Mr. Cazaras suffered
6 prejudice as a result of this violation. Therefore, Mr. Cazaras' prior
7 order of removal may not be the predicate for this § 1326 indictment.
8 Accordingly, **IT IS HEREBY ORDERED:**

- 9 1. Defendant's Motion to Dismiss, **ECF No. 26**, is **GRANTED**.
10 2. The Indictment is **DISMISSED with prejudice**.
11 3. Defendant shall be **RELEASED** from U.S. Marshal custody.
12 4. All hearings and trial are **STRICKEN**.
13 5. This file shall be **CLOSED**.

14 **IT IS SO ORDERED.** The Clerk's Office is directed to enter this
15 Order and provide copies to all counsel, the U.S. Probation Office,
16 and the U.S. Marshals Service.

17 **DATED** this 7th day of October 2015.

18
19 s/Edward F. Shea
EDWARD F. SHEA
20 Senior United States District Judge
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